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May 14, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CS Docket 96-46

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.1206, I submit this original and one copy of a letter disclosing a written and oral ex parte presentation in the above-captioned proceeding.

On May 14, 1996, the undersigned and Frederick E. Ellrod III, on behalf of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, California; the City of Chillicothe, Ohio; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, Missouri; the City of Santa Clara, California; and the City of Tallahassee, Florida, met with Meredith Jones, Rick Chessen, Meryl Icove, Gary M. Laden, John E. Logan, and Lawrence A. Walke of the Cable Services Bureau. The meeting dealt with proposed regulations regarding access to capacity, nondiscrimination, reasonable carriage rates, and related issues for open video systems, especially in those cases where an OVS operator might not be the second market entrant or might not face competition (particularly if a cable operator were permitted to

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convert to OVS), and including matters set forth in the attached memoranda, which were handed out at the meeting.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By

Tillman L. Lay

Enclosures

cc: Meredith Jones
Rick Chesson
Meryl Icove
Gary M. Laden
John E. Logan
Lawrence A. Walke

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OPEN VIDEO SYSTEMS
(CS Docket No. 96-46)

May 14, 1996

National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida

I. MAKING OVS WORK: PROPOSED REGULATIONS

- Open Access
 - Ensure access to capacity for independent video programming providers: *Proposed Rules, § 8*
 - Ensure reasonable and nondiscriminatory terms and conditions: *Proposed Rules, § 9*
 - Ensure reasonable and nondiscriminatory rates: *Proposed Rules, § 10*
- Certification Process
 - Adequate preparation by applicant to enable expedited FCC review: *Proposed Rules, § 4(b)*
 - Public notice and comment: *Proposed Rules, §§ 4(a)(2), 5*

- **Enforcement of FCC Regulations**
 - Annual report to enable detection of potential violations: *Proposed Rules, § 6*
 - FCC investigation: *Proposed Rules, § 14(a)-(c)*
 - Remedies: decertification, fines or forfeitures: *Proposed Rules, § 14(d)*
 - Dispute resolution process for carriage complaints: *Proposed Rules, § 15*
- **PEG Access Requirements**
 - OVS operator options: "Match or negotiate": *Proposed Rules, §§ 4(b)(4), 12(b)(2), 12(d)*
 - Types of PEG obligations: channel capacity, services, facilities, and equipment. *Proposed Rules, § 12(a), (d)*
 - Tracking community needs and interests: *Proposed Rules, § 12(a)-(e)*
- **Fee In Lieu of Franchise Fee: *Proposed Rules, § 11***
- **Cable/OVS Relationship**
 - Cable operator as OVS operator: *Proposed Rules, § 3(b)*
 - Cable operator as independent video programming provider: *Proposed Rules, § 8(f)*
- **Right-of-Way Issues**
 - Effect of Commission approval of certification: *Proposed Rules, §§ 4(b)(3), 5(e)(2)*
 - State and local law governs disputes over right-of-way authority. *Proposed Rules, § 15(a)(2), (b)(2)*

II. LECs WILL SET CARRIAGE RATES TO EXCLUDE INDEPENDENT PROGRAMMING PROVIDERS UNLESS THE COMMISSION'S RULES ENSURE THAT RATES ARE REASONABLE

- The LECs have admitted they will discriminate if they can, to make OVS resemble a closed cable system.
 - The LECs oppose *any* formula to evaluate the reasonableness of carriage rates. *See, e.g.*, Joint Parties' May 2, 1996, Letter to Cable Bureau at 1.
 - The LECs also oppose result-based criteria to determine whether their carriage rates actually permit independent video programming providers to use the ostensibly open system, such as the "yardstick" test proposed in *Comments of the National League of Cities et al.* at 20 (April 1, 1996).
- Instead, the LECs seek additional rules to place burdens on independent VPPs and to protect OVS operators.
 - The LECs advocate a "safe harbor" in which rates are *conclusively* presumed reasonable. *See* Joint Parties' May 2, 1996, Letter to Cable Bureau at 2.
 - Presence of a single unaffiliated video programming provider ("VPP") is woefully insufficient to ensure that rates are reasonable. An OVS operator could enter into a "sweetheart deal" or tradeoff arrangement with a friendly unaffiliated VPP so as to exclude all other unaffiliated VPPs — particularly if "unaffiliated" VPPs are permitted to have relationships other than a carrier-user relationship. For example, U S West and Continental could agree to serve reciprocally as each others' single "unaffiliated" VPP in their respective markets.
 - Thus, an OVS operator could readily reach an arrangement with its single unaffiliated VPP allowing rates too high for true independent VPPs to afford, through a "back-door" deal that would reduce the true cost to the favored VPP. Such an arrangement would be even easier to conceal if, as the LECs request, the OVS operator need merely charge affiliated and unaffiliated VPPs prices that are "equivalent" (not equal) for carriage of *similar* programming under *similar* circumstances — criteria so loose that the OVS operator could claim they would be

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met by almost any rates. See Joint Parties' May 2, 1996, Letter to Cable Bureau at 2.

- The LECs suggest that OVS operators should be able to use *unpublished* rate cards to expand this safe harbor and further discourage complaints. Joint Parties' May 2, 1996, Letter to Cable Bureau at 2-3.
 - The LECs offer no rationale why carriage rates to favored VPPs would become more reasonable — much less why they should be *conclusively* presumed reasonable — if the LEC had the rates engraved on unpublished rate cards.
 - If, as the LECs argue, contracts at rates different from those on the rate cards would also be presumed reasonable, it is difficult to see how such a rate card could help "ensure that the rates, terms, and conditions for such carriage are just and reasonable." 1996 Act § 302(a) (adding new § 653(b)(1)(A)).
- The LECs would place the burden on an independent VPP to provide evidence of discrimination, even though the necessary information is in the possession of the OVS operator.
 - The LECs' rules would require an independent VPP to allege in its complaint with particularity, and with substantial evidence, that the operator *intentionally* treated it *substantially* differently from other *similarly situated* VPPs; that such treatment was commercially unreasonable; and that such treatment caused the complainant actual and substantial harm (§ 10(c)(1), (f)(1)(G)-(I)).
 - Yet the only way an independent VPP could acquire such evidence under the LECs' rules would be through an FCC discovery order — which would not be issued until *after* such a complaint were filed and met the LECs' stringent pleading standards (§ 10(j)).
 - Even if an independent VPP could obtain an unpublished rate card, such a card would show only one possible rate, and would not allow an independent VPP to determine whether other VPPs had received more favorable rates, terms, or conditions. Joint Parties' May 2, 1996, Letter to Cable Bureau at 2-3.

- Thus, the LECs' dispute resolution procedure is designed to hinder and prevent independent VPPs from bringing complaints — despite the fact that the LECs would have the Commission avoid all specific rules or tests and depend solely upon this one-sided procedure to ensure just and reasonable carriage rates.

III. THE LECs SEEK TO INDUCE THE COMMISSION TO INTERFERE WITH STATE LAW SO AS TO EFFECT A TAKING.

- Under the LECs' proposed rules, the Commission would claim to authorize use of local public rights-of-way regardless of any limitations on the scope of any existing authority a LEC may have. Joint Parties' May 2, 1996, Letter to Cable Bureau at 3.
- The scope of any grant of authority to use the public rights-of-way is determined by state and local law and the specific language of such grants. Any ambiguity in such a grant is to be construed in favor of the grantor and against the grantee. See, e.g., 37 C.J.S. § 21(b), p. 167 (1995), citing *inter alia Broad River Power Co. v. State of South Carolina ex rel. Daniel*, 281 U.S. 537, 50 S. Ct. 401, 404, *aff'd on reh'g*, 282 U.S. 187, 51 S. Ct. 94 (1930).
- Adoption of the LECs' proposed rule to preempt such grants would represent a Fifth Amendment taking, paid for by federal taxpayers rather than by the LECs.
- Congress did not authorize such a taking, nor provide for compensation for the market value of such property. The LECs' proposed approach would unnecessarily delay the introduction and market test of OVS by provoking constitutional litigation.
- The OVS regulatory scheme releases OVS operators from numerous federal regulations. If this incentive is not sufficient to induce LECs to choose OVS over cable (as the LECs suggest, Joint Parties' May 2, 1996, Letter to Cable Bureau at 3), the LECs are free to become cable operators instead.

COMPARISON OF PROPOSED OVS RULES
NATIONAL LEAGUE OF CITIES ET AL.

Open Access	1
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COMPARISON OF PROPOSED OVS RULES
NATIONAL LEAGUE OF CITIES ET AL.

Statutory Requirement	NLC et al. Proposal	LEC Proposal
Open Access		
Ensure access to capacity for IVPPs § 653(b)(1)(B)	Open access. § 8(a)(1)	When demand exceeds capacity, operator may refuse carriage, reduce its capacity. § 6(a) nn.1, 2 Operator not required to reduce its capacity below 1/3. § 6(a) n.1
● Access to both analog and digital capacity as applicable	Open, nondiscriminatory access to capacity of both types. §§ 8(c)(1), 9(b)	
● Channel counting	PEG & must-carry channels count neither in total nor in 1/3 share. § 8(c)(2)(A) Shared channels count according to number of sharers. § 8(c)(2)(B)	PEG & must-carry channels count in total, but not in 1/3 share. § 6(b) n.2 Shared channels count in total, but not in 1/3 share. § 6(b) n.2, § 6(d) n.
● Availability of initial capacity	Capacity assigned proportionately. § 8(b)(1)	
● Subsequent availability of capacity	Operator must provide capacity in 30 days if less than 2/3 occupied by IVPPs. § 8(b)(2) Capacity rights assignable among IVPPs. § 8(e)	
● Reasonable maximum capacity requirements	No limit less than 1/3 unless IVPP demand exceeds 2/3 capacity. § 8(d)(2)	If demand exceeds capacity, neither operator nor IVPP controls more than 1/3. Operator may limit IVPPs to 1/3. § 6(b) & n.1

Statutory Requirement	NLC et al. Proposal	LEC Proposal
<ul style="list-style-type: none"> ● Reasonable minimum capacity requirements 	Single-channel and part-time capacity to be made available. § 8(d)(1)	
<ul style="list-style-type: none"> ● Definition of IVPP 	(1) Provides video programming of its own selection through carriage agreement, and (2) has no financial or business relationship with operator other than carrier-user relationship. § 2(c)	Unaffiliated. <i>E.g.</i> , § 6(b) n.1.
Ensure reasonable and nondiscriminatory terms and conditions § 653(b)(1)(A)	Nondiscrimination principle. § 9(a)	Nondiscrimination principle. § 6(a)
<ul style="list-style-type: none"> ● Reasonable financial conditions for IVPP 	<p>Operator may impose no minimum contract term more than one month or maximum less than one year. § 8(d)(3)</p> <p>Operator may require two months' carriage charges in advance. § 9(g)</p> <p>No discrimination based on financial qualifications. § 9(g)</p>	<p>Operator may impose reasonable requirements for creditworthiness and financial stability. § 6(a)(1)</p> <p>Operator may require minimum contract periods. § 6(a)(1) n.3</p> <p>Operator may require security deposits. § 6(a)(1) n.2</p> <p>Operator may create classes based on creditworthiness or financial stability. § 6(a)(1) n.1</p>
<ul style="list-style-type: none"> ● Nondiscriminatory channel positioning § 653(b)(1)(E)(i) 	No unreasonable discrimination in positioning, material provided, or identification. § 9(d)	Operator may not unreasonably discriminate in material provided, but must pass through identification. § 6(e)

Statutory Requirement	NLC et al. Proposal	LEC Proposal
<ul style="list-style-type: none"> ● Prevent discrimination in shared channels § 653(b)(1)(C) 	Any channel offered by more than one VPP to be carried on shared channel. § 9(d)	Operator may carry channels offered by more than one VPP on shared channel. Operator administers channel sharing. § 6(d)
<ul style="list-style-type: none"> ● Prevent discrimination in marketing 	Operator may independently offer programming also offered by IVPPs. § 9(e)	Operator may offer all IVPP programming as well as its own. § 6(c) n.
<ul style="list-style-type: none"> ● Prevent discrimination in technical requirements 	Operator may set reasonable technical standards. § 9(h)(2) Necessary technical and similar information must be made available to VPPs. § 9(f)	Operator may require evidence of ability to meet technical standards. § 6(a)(3)
<ul style="list-style-type: none"> ● Other reasonable conditions 	Operator may require evidence of lawful access to programming, indemnification. § 9(h)(1) Operator may require timely provision of programming. § 9(h)(3)	Operator may require evidence of lawful access to programming prior to carriage agreement. § 6(a)(2) Operator may require reasonable assurances of timely provision of programming. § 6(a)(4)
<p>Ensure reasonable and nondiscriminatory carriage rates § 653(b)(1)(A)</p>	Rates must be just and reasonable, and not unjustly or unreasonably discriminatory. § 10(a)-(b)	Rates must be just and reasonable, and not unjustly or unreasonably discriminatory. § 6(a)
<ul style="list-style-type: none"> ● Access to information about rates 	Open pricing; carriage rates filed with FCC. § 10(d)	FCC may order discovery. § 10(j) Documents submitted in disputes may be protected as proprietary. § 10(k), (g)(5)(D)

Statutory Requirement	NLC et al. Proposal	LEC Proposal
<ul style="list-style-type: none"> • Uniform rates 	<p>Operator must justify rate differences based on 47 U.S.C. §§ 531, 534, 535; costs of carriage; nonprofit status. § 10(e)(1)</p> <p>No discrimination based on content. § 10(e)(2)</p> <p>"Most favored nation" clause. § 10(e)(3)</p> <p>De minimis differences may be elected by any VPP. § 10(h)</p>	<p>Operator must state its reasons for any differential. § 10(g)(5)(C)</p> <p>Operator may impose price differences up to \$.05/subscriber or 5% as de minimis without further justification. § 10(g)(5)(B)</p>
<ul style="list-style-type: none"> • "Reality check" yardstick to gauge reasonableness of rates 	<p>Rates presumed <i>unreasonable</i> unless:</p> <ul style="list-style-type: none"> • At least four IVPPs • At least 1/3 of capacity used by IVPPs. § 10(f) 	<p>"Safe harbor": rates conclusively presumed <i>reasonable</i> if</p> <ul style="list-style-type: none"> • At least one IVPP • rates to IVPPs equivalent to those charged to affiliates for similar programming under similar circumstances. Joint Parties' May 2, 1996 letter to Cable Bureau at 2
<ul style="list-style-type: none"> • Correction of unreasonable rates 	<p>FCC may set rates based on cost and reasonable rate of return. § 10((g))</p> <p>If FCC does not act, operator must ratchet rates down by 10% increments until yardstick requirements satisfied. § 10(g)</p>	<p>FCC may establish rates, terms and conditions. § 10(v)(1)</p>
<ul style="list-style-type: none"> • Changes in rates 	<p>Once annually, with 30 days' notice. § 10(c)</p>	

Statutory Requirement	NLC et al. Proposal	LEC Proposal
Must-carry, sports exclusivity, network non-duplication, syndicated exclusivity, etc. § 653(b)(1)(D), (b)(2)	Application of Part 76 provisions. § 7	Application of Part 76 provisions. §§ 5, 6(e), 7-8
Certification Process § 653(a)(1)		
Access to filings; public notice	Submission in paper and electronic forms. § 4(a)(2) Posting in reference room and on Internet. § 5(a)(1) Notice by electronic mailing list. § 5(a)(2)	FCC to publish notice. § 4(b)
Basic information permitting FCC to process certification	Name(s), form, contact, communities served, date of service, affiliated LECs. § 4(b)(1)(A)-(E)	Name(s), form, responsible partner, contact, communities served, date of service. § 4(c)(1)-(6)
Certification of LEC status	Yes. § 4(b)(1)(F)	
Certification of compliance with FCC rules	Yes. § 4(b)(2)	Yes. § 4(a), (c)(6)
Certification of open access	List of IVPPs. § 4(b)(5) Carriage contracts. § 4(b)(6)	
Certification of compliance with PEG requirements	Yes. § 4(b)(4)	
Certification of compliance with any applicable right-of-way requirements	Yes. § 4(b)(3)	

Statutory Requirement	NLC et al. Proposal	LEC Proposal
FCC processing of certification	Public comment. § 5(b) Notice of facial incompleteness. § 5(c) 10-day time limit. § 5(d)	10-day time limit; FCC inaction deemed approval. § 4(b)
Enforcement § 653(b)(1)		
FCC authority	No OVS without FCC's authorization. § 3(c) Approval subject to continued compliance and review. § 5(e)-(f)	OVS exempted from all FCC rules except as specifically provided. § 3
● Reporting requirements to monitor discrimination	Annual report. § 6	
● FCC investigation	FCC may investigate upon complaint or by own motion. § 14(a)(1) FCC will investigate if <ul style="list-style-type: none"> ● yardstick test not satisfied ● affiliate fails to earn reasonable ROR ● no MFN clause in carriage contract ● inconsistent rates, terms, conditions ● FCC aware of potential violation Operator shall respond to FCC's information requests. § 14(c)	
● Effect of inaction	No right created by inaction. § 14(b)	

Statutory Requirement	NLC et al. Proposal	LEC Proposal
<ul style="list-style-type: none"> ● Remedies for violation of FCC regulations 	<ul style="list-style-type: none"> ● Decertification, after notice and opportunity to respond (decertified operator must obtain cable franchise). § 14(d)(1) ● Fines or forfeitures. § 14(d)(2) ● Other lawful remedies. § 14(d)(3) 	
<p>Dispute resolution process § 653(a)(2)</p>	<p>Applies to carriage disputes, not right-of-way issues. § 15(a)(1)-(2), (b)(2)</p> <p>Parties may seek other remedies. § 15(a)(3)</p> <p>Operator has burden of proof. § 15(c)</p> <p>§ 180-day time limit. § 15(e)</p> <p>Service on affected parties. § 15(b)(3)</p>	<p>Applies to VPPs. § 10(a)</p> <p>Operator may require IVPP to submit to ADR prior to FCC action. § 10(b)</p> <p>Complainant shall allege (1) intentionally different treatment, (2) such treatment commercially unreasonable, and (3) actual and substantial harm. § 10(c), (f)(1)(G)</p> <p>180-day time limit. § 10(a)</p> <p>Service on affected parties. § 10(o)</p> <p>Complainant must notify operator and allow at least 10 days to respond. § 10(d)</p> <p>Detailed pleading requirements imposed on complainant. § 10(e)-(i), (l), (n)</p> <p>Documentary evidence or affidavit required with complaint. § 10(f)(1)(H)</p>

Statutory Requirement	NLC et al. Proposal	LEC Proposal
	FCC may award carriage, damages, or both. § 15(f)	<p>Other detailed procedural requirements. § 10(m), (p)-(s)</p> <p>Sanctions for frivolous complaints. § 10(t)</p> <p>One-year statute of limitations. § 10(u)</p> <p>FCC may order appropriate remedies. § 10(v)</p> <p>Operator not liable for damages accruing after 180-day limit. § 10(a)</p>
PEG Access / Title VI § 653(c)(1)(B), (2)(A)		
No greater or lesser than cable operator	<p>"Match or negotiate." §§ 4(b)(4), 12(b)(2), 12(d)</p> <p>LFA to designate rules and procedures for operator use of unused PEG capacity (as Cable Act). § 12(g)</p> <p>No editorial control. § 12(h)</p>	<p>Operator to designate capacity for PEG use. § 6(f)</p> <p>Operator may use unused PEG capacity. § 6(f)(5)</p> <p>No editorial control, except re obscene, indecent, or similar material. § 6(f)(6)</p>
● Types of PEG obligations	Channel capacity, services, facilities, or equipment. § 12(a), (d)	Capacity only. § 6(f)
● Technical facilities to enable access	Special conversions required by system to be provided by operator. § 12(f)	
Consistent with local community needs and interests	LFA sets PEG requirements for each franchise area independently. § 12(a)-(b)(1), (e)(2)	Operator's provision of PEG capacity not subject to regulation by LFA. § 6(f)

Statutory Requirement	NLC et al. Proposal	LEC Proposal
		<p>Operator makes capacity available in manner comparable to that generally in use in franchise area. § 6(f)(2)</p> <p>Operator need not dedicate entire channels to particular entities. § 6(f)(2)</p> <p>Operator to make access available first-come first-served, by lottery, or any other reasonable mechanism. § 6(f)(3)</p>
<ul style="list-style-type: none"> ● Availability to subscribers 	<p>PEG channels must be available to all subscribers. § 12(e)(1)</p>	
<ul style="list-style-type: none"> ● Change in obligations 	<p>Updated to track cable operator's obligations. § 12(c)</p>	
<ul style="list-style-type: none"> ● Interconnection with cable access channels 	<p>On request of LFA. § 12(e)(3).</p> <p>Obligations may be met by added support for existing channels with consent of LFA and cable operator. § 12(e)(4)</p>	
<ul style="list-style-type: none"> ● Establishment of PEG in the absence of an existing cable franchise 	<p>By negotiation with LFA. § 12(b)(3)</p>	
<p>Negative option billing</p>	<p>Negative option billing prohibited. § 13(a)</p>	
<p>Fee in lieu of franchise fees</p>	<p>May be required by LFA. § 11(a)</p> <p>Notice of commencement of operation by operator; notice of fee by LFA. § 11(b)</p>	<p>Operator may be subject to fees. § 9(a)</p>

Statutory Requirement	NLC et al. Proposal	LEC Proposal
	<p>Fees on same revenue base and at same rate as any cable operator. § 11(c)-(d)</p> <p>Payment on same basis as cable operator. § 11(e)</p> <p>Operator may designate fees on bills. § 11(f)</p>	<p>Fees not to exceed rate of any cable operator; revenue base specified in regulations. § 9(a)</p> <p>Operator may designate fees on bills. § 9(b)</p>
Cable/OVS Relationship		
	§ 653(a)(1)	
Cable operator as OVS operator	Only where (i) a LEC and (ii) not a franchised cable operator. § 3(b)	
Cable operator as IVPP	In areas where cable operator holds a cable franchise, only with FCC approval. § 8(f)	
Right-of-Way Issues		
	U.S. CONST. amend. V	(§ 653(c)(2)(B))
Effect of Commission approval	Gives LECs no rights in local public rights-of-way. §§ 4(b)(3), 5(e)(2)	Precludes state or local authority from (i) requiring additional authorization or (ii) imposing conditions more burdensome than those imposed on other interstate carriers. § 4(d)
Disputes over right-of-way authority	Question of state and local law. § 15(a)(2), (b)(2)	

Abbreviations:

- ADR: alternative dispute resolution
IVPP: independent video programming provider
LEC: local exchange carrier
LFA: local franchising authority
MFN: most favored nation
"Operator": OVS operator (unless otherwise stated)
ROR: rate of return
VPP: video programming provider

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